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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

DATE: MAY 11 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) summarily dismissed the petitioner's subsequent appeal. The matter is now before the Administrative Appeals Office (AAO) on a combined motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner filed a nonimmigrant visa petition seeking to extend the beneficiary's employment as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition on February 14, 2008 concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner requested that the petitioner be given additional time to file a new or amended petition establishing that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel explained the petitioner was unable to develop the United States export enterprise as originally described in the petition and is now planning to operate a "retail food outlet." On April 2, 2009, the AAO summarily dismissed the petitioner's appeal, pursuant to 8 C.F.R. § 103.3(a)(1)(v). The AAO determined that the petitioner failed to identify an erroneous legal conclusion or factual statement in the director's decision as a basis for the appeal. The AAO advised the petitioner that it is not precluded from filing a new petition on behalf of the beneficiary if it believes a change in circumstances now renders it eligible for the benefit sought under this visa classification.

The petitioner timely filed a combined motion to reopen and motion to reconsider on May 5, 2009. On the Form I-290B, Notice of Appeal or Motion, counsel asserts that "[the beneficiary] is requesting that the Service to re-consider an amended "new office" petition to his original L-1A petition under 8 C.F.R. 214.2(l)(7)(i)(C) which states in part "where there are changes in the approved relationships, additional qualifying organizations and any information which would affect the beneficiary's employment and [*sic*] amended petition must be filed." Counsel indicates that the petitioner is submitting with the motion "an amended I-129L extension of status petition."

The regulation at 8 C.F.R. § 103.5(a)(2) states:

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In addition, in order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, the petitioner failed to submit a statement regarding whether the validity of the decision of the AAO has been or is subject of any judicial proceeding. As such, the motion must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

As a preliminary matter, we note that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Here, the petitioner states on motion that it is requesting that USCIS reconsider an amended new office petition pursuant to 8 C.F.R. § 214.2(l)(7)(i)(C), due to the petitioner's investment in a new business entity in 2008. The petitioner submits for review a Form I-290B with the required filing fee; an amended, un-executed Form I-129, Petition for a Nonimmigrant Worker; a copy of the beneficiary's resume; a copy of the initial approval notice granting the beneficiary L-1A classification for the period September 29, 2005 until January 2, 2007; copies of Pennsylvania Form UC-2A, Employer's Quarterly Report of Wages Paid to Each Employee, and IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2009; a Bill of Sale of Business dated October 2, 2008 which identifies the petitioner as the buyer of a Sunoco Gas Station and Convenience Store located in Riverside, Pennsylvania; a lease agreement for the gas station premises; an asset purchase agreement related to the same business; the petitioner's 2009 cigarette dealer license; the petitioner's 2008 IRS Form 1120, U.S. Corporation Income Tax Return; and the company's recent bank statements.

The petitioner's submission does not meet the requirements of a motion to reopen. A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1] However, the petitioner must still establish eligibility at the time of filing the nonimmigrant visa petition. Again, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Here, the "new" evidence relates to the petitioner's and beneficiary's eligibility for the requested status as of the first quarter of 2009. The petitioner filed the instant petition on December 21, 2006, therefore, any "new" fact submitted in support of a motion to reopen must establish eligibility as of that date. The petitioner does not claim that the director erred in denying the petition as originally filed, nor has it explained how the new evidence establishes that the

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New College Dictionary* 736 (2001)(emphasis in original).

beneficiary was qualified for the benefit sought as of that date. Accordingly, the petitioner's motion to reopen will be dismissed.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). The moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. See *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

In this case, the petitioner failed to support its motion with any legal argument or precedent decisions to establish that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy. Counsel requests that the AAO "re-consider" an amended petition, and submits a new petition with new supporting documentation that post-dates the filing of the original petition by as much as two years. Again, we emphasize that a motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Counsel requests reconsideration of the petition pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) which states:

> *Amendments.* The petitioner must file an amended petition, with fee, at the USCIS office where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or an information which would affect the beneficiary's eligibility under section 101(a)(15)(L).

Counsel's request to amend the petition is not properly before the AAO, as there are no statutory or regulatory provisions that allow a petitioner to amend a petition during an appeal or motion proceeding. Furthermore, the above-cited regulation is applicable only when changes occur during the validity period of an approved petition, and allows USCIS to determine whether those changes affect a petitioner's or beneficiary's continued eligibility for the previously granted status.

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. If the petitioner or beneficiary becomes eligible under a new set of facts after the petition is denied, the proper course of action is to file a new petition, with filing fee and required initial evidence, at the appropriate service center. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the AAO's previous decision dated April 2, 2009 will not be disturbed.

ORDER: The motion to reopen and the motion to reconsider are dismissed.